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CAS v MPPL & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1013–05 OF 2016
ABANG ISKANDAR, UMI KALTHUM AND NALLINI PATHMANATHAN JJCA
15 OCTOBER 2018

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Civil Procedure — Originating summons — Declaration — Determination of biological father of child — Plaintiff claimed having affair with first defendant before and after defendants' marriage — Plaintiff sought DNA test to be carried out to determine biological father of child — Whether plaintiff's action caught by s 112 of the Evidence Act 1950 — Whether there were crucial matters to be ventilated by parties — Whether origination summons ought to be converted to writ action — Rules of Court 2012 O 14A

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E

Evidence — Proof of — Paternity — Determination of biological father of child — Plaintiff claimed having affair with first defendant before and after defendants' marriage — Plaintiff sought DNA test to be carried out to determine biological father of child — Difference between 'paternity' and 'legitimacy' — Whether s 112 of the Evidence Act 1950 concerned paternity and barred enquiry into paternity of child — Whether declaration of paternity had effect of illegitimising child — Evidence Act 1950 s 112

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Family Law — Children — Paternity — Proof of — Plaintiff claimed having affair with first defendant before and after defendants' marriage — Plaintiff sought DNA test to be carried out to determine biological father of child — Whether paternity test ought to be ordered — Whether order could be made in best interests of child — United Nations Convention on Rights of the Child articles 3 & 7

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The first defendant was a female who was an air stewardess/flight attendant. The second defendant was a pilot and the first defendant's husband. The defendants married on 3 March 2007 and the first defendant gave birth to her daughter ('child C') on 23 June 2008. Child C thus was born into a valid marriage between the defendants. The plaintiff was a male and also made his living as a pilot. The plaintiff claimed that he had been having an affair with the first defendant even before her marriage to the second defendant, and that this affair continued even after the defendants' marriage. The plaintiff claimed that when child C was born, he had lived periodically with the first defendant and

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child C as a family, notably when the second defendant was on flight duty. The plaintiff also alleged that all this while, he had been paying the first defendant a monthly sum as 'maintenance' for child C. He claimed that his payment of this 'maintenance' only stopped when the first defendant closed her Maybank account circa August 2014. The plaintiff asserted that the first defendant stopped giving him access to child C in December 2013 and ended their relationship in early 2014. The plaintiff filed this suit, namely this amended originating summons ('encl 5') praying for, inter alia, the court to order a DNA test to determine child C's paternity and the resulting declaration that the plaintiff was her father on the ground that it was necessary for child C to know who her birth father was, in case of any medical emergencies that may arose in the future. The defendants argued that if the court allowed the plaintiff's declaration on the point of paternity, ie declaring the plaintiff as the child C's biological father, the said declaration would rendered child C an illegitimate child — being born out of the wedlock between the defendants. The defendants accordingly retaliated with an application of their own for the determination of questions of law pursuant to O 14A of the Rules of Court 2012 and prayed in encl 16, inter alia, that the plaintiff's application in encl 5 must be dismissed. The High Court judge allowed encl 16 and dismissed encl 5 on the grounds that the plaintiff's action in the said encl 5 was without merit and had no legal basis ('the impugned order'). Hence, this appeal by the plaintiff.

Held, allowing the appeal; setting aside the impugned order; dismissing encl 16; ordering encl 5 to be converted into a writ action; and remitting the matter to the High Court for trial:

(1) The learned judge fell into error when Her Ladyship linked paternity with legitimacy. Section 112 of the Evidence Act 1950 ('the EA') only concerned the latter ie legitimacy and did not bar enquiry into the paternity of a child. The concepts of 'paternity' and 'legitimacy' should necessarily be separated. The former concerned a question of fact; the latter a question of law. The law recognised that a child may in fact be an illegitimate child, but, by operation of the law, the said child may still be considered legally legitimate (see paras 22–24 & 28).

(2) Enquiries per se into paternity did not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the said child was not the determining factor when deciding to order a DNA test to determine paternity. Instead, the best interest of the child to know its biological parents was the larger concern. In this vein, the learned judge fell into error in Her Ladyship's pre-occupation with the supposed fear of illegitimising child C. This legal issue should had been accorded full consideration after a full ventilation of the factual matrix to determine the disputed factual issues. The learned judge had erred in summarily

A determining an important point of law effectively *in vacuo* (see paras 36–38).

(3) When there was a substantial dispute as to fact in any proceedings, such proceedings shall be begun by writ. The defendants denied many of the B allegations made by the plaintiff in respect of his purported relationship with the first defendant and child C. These were crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination could only be made with full viva voce evidence (see para 40).

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[Bahasa Malaysia summary

Defendan pertama ialah seorang wanita yang merupakan seorang pramugari. Defendan kedua ialah seorang juruterbang dan suami defendan pertama. Defendan-defendan berkahwin pada 3 Mac 2007 dan defendan pertama D melahirkan anak perempuannya ('anak C') pada 23 Jun 2008. Oleh itu, anak C dilahirkan dalam perkahwinan yang sah antara defendan-defendan. Plaintif adalah seorang lelaki dan juga bekerja sebagai seorang juruterbang. Plaintif mendakwa bahawa dia telah mengadakan hubungan sulit dengan defendan pertama sebelum perkahwinannya kepada defendan kedua, dan hubungan E sulit ini berterusan walaupun selepas perkahwinan defendan. Plaintif mendakwa bahawa apabila anak C dilahirkan, dia telah sekali-sekala tinggal dengan defendan pertama dan anak C sebagai sebuah keluarga, terutamanya ketika defendan kedua sedang bertugas. Plaintif juga mendakwa bahawa selama ini, dia telah membayar defendan pertama sejumlah wang bulanan F sebagai 'nafkah' untuk anak C. Dia mendakwa bahawa pembayaran 'nafkah' ini hanya berhenti apabila defendan pertama menutup akaun Maybanknya sekitar Ogos 2014. Plaintif menegaskan bahawa defendan pertama berhenti memberinya akses kepada anak C pada bulan Disember 2013 dan mengakhiri hubungan mereka pada awal tahun 2014. Plaintif memfailkan guaman ini, G iaitu saman pemula yang dipinda ini ('lampiran 5') memohon untuk, antara lain, mahkamah untuk memerintahkan ujian DNA untuk menentukan bapa anak C dan perisytiharan yang terhasil bahawa plaintif adalah bapanya atas alasan bahawa ia adalah perlu bagi anak C untuk mengetahui siapa bapa kelahirannya, sekiranya ada kecemasan perubatan yang mungkin timbul dalam H masa depan. Defendan berpendapat bahawa jika mahkamah membenarkan perisytiharan plaintif pada taraf paterniti, iaitu mengisytiharkan plaintif sebagai bapa biologi kanak-kanak tersebut, perisytiharan tersebut akan menjadikan anak C sebagai anak tidak sah — dilahirkan luar nikah antara defendan. Defendan oleh itu membalas dengan permohonan mereka sendiri I untuk penentuan soalan undang-undang menurut A 14A dari Kaedah-Kaedah Mahkamah 2012 dan memohon dalam lampiran 16, antara lain, bahawa permohonan plaintif di dalam lampiran 5 harus ditolak. Hakim Mahkamah Tinggi membenarkan lampiran 16 dan menolak lampiran 5 atas alasan tindakan plaintif di dalam lampiran 5 tersebut tidak mempunyai merit dan

tidak mempunyai asas undang-undang ('perintah yang dipertikaikan'). Oleh itu, rayuan ini oleh plaintif. A

Diputuskan, membenarkan rayuan; mengetepikan perintah yang dipertikaikan; menolak lampiran 16; memerintahkan lampiran 5 untuk ditukarkan kepada writ tindakan; dan meremit perkara ke Mahkamah Tinggi untuk perbicaraan: B

(1) Hakim yang bijaksana telah terkhilaf ketika beliau mengaitkan paterniti dengan kesahtarafan. Seksyen 112 Akta Keterangan 1950 ('AK') hanya memberi perhatian kepada kesahtarafan dan tidak menghalang siasatan ke atas paterniti seorang kanak-kanak. Konsep 'paterniti' dan 'kesahtarafan' mestilah dipisahkan. Peterniti berkenaan dengan persoalan fakta; kesahtarafan adalah persoalan undang-undang. Undang-undang mengakui bahawa kanak-kanak sebenarnya boleh menjadi kanak-kanak yang tidak sah, tetapi, melalui undang-undang, kanak-kanak tersebut masih boleh dipertimbangkan sah (lihat perenggan 22–24 & 28). C D

(2) Pertanyaan semata-mata kepada paterniti tidak dalam pengertian ini tidak mengesahkan seorang kanak-kanak. Oleh itu, penekanan ini terhadap ketakutan untuk tidak mengesahkan kanak-kanak tersebut bukanlah faktor penentuan ketika memutuskan untuk memerintahkan ujian DNA untuk menentukan paterniti. Sebaliknya, kepentingan anak untuk mengetahui ibu bapa biologinya adalah kebimbangan yang lebih besar. Dengan ini, hakim yang bijaksana telah terkhilaf dengan rasa takut untuk tidak mengesahkan anak C. Isu perundangan ini sepatutnya diberikan pertimbangan penuh setelah hujahan lanjut matriks faktual untuk menentukan isu fakta yang dipertikaikan. Hakim yang bijaksana telah terkhilaf dalam menentukan perkara perundangan yang penting secara efektif *in vacuo* (lihat perenggan 36–38). E F

(3) Apabila terdapat pertikaian yang besar tentang fakta dalam apa-apa prosiding, prosiding sedemikian hendaklah dimulakan dengan writ. Defendan menafikan banyak tuduhan yang dibuat oleh plaintif berkenaan dengan hubungannya dengan defendan pertama dan anak C. Ini adalah perkara penting. Tuntutan plaintif sepatutnya tidak ditolak secara serta-merta sekiranya tiada penentuan kehakiman mengenai isu-isu penting ini. Penentuan tersebut hanya boleh dibuat dengan keterangan penuh viva voce (lihat perenggan 40).] G H

Notes I

For a case on proof of paternity, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 2904.

For cases on declaration, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 6766–6773.

A For cases on paternity, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4031–4033.

Cases referred to

B *Babu Remyalayam Veettil v Vidya D/o Santhini Kalathinte Padeetthathil Veettil* OP (FC) No 507 of 2014 (R), HC (refd)
Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (refd)
Chua Kim Suan v Ang Mek Chong [1988] 3 MLJ 231, HC (refd)
C *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353, HC (refd)
Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832, HC (refd)
Rohit Shekhar v Narayan Datt & Anor (FAO(OS) No 547/2011, HC (folld)
D *The State of Punjab v Shamlal Murari & Anor* [1976] 1 SCC 719, SC (folld)

Legislation referred to

Courts of Judicature Act 1964 15, 15(2)
Evidence Act 1950 s 112
E Evidence Act 1872 [IND] s 112
Rules of Court 2012 O 1A, O 2 r 1, O 5 rr 2, 4, O 14A, O 28 r 8, O 92 r 4

Appeal from: Originating Summons No 24F-107–07 of 2015 (High Court,
F Kuala Lumpur)

Honey Tan Lay Ean (Tan Law Practice) for the appellant.
YN Foo (Kiran Dhaliwall with her) (YN Foo & Partners) for the respondents.

G **Nallini Pathmanathan JCA:**

INTRODUCTION

[1] This appeal raises one question of law fundamental to the welfare of a
H child. It is:

To what extent does section 112 of the Evidence Act 1950 ('the EA') apply, if at all, in a suit to determine paternity.

I **[2]** Pursuant to s 15(2) of the Courts of Judicature Act 1964 ('the CJA 1964'), the names of all the parties and the child concerned will not be published in this judgment. For ease of reference, parties will be referred to as they were in the court below.

SALIENT FACTS

[3] The first defendant is a female who is an air stewardess/flight attendant. The second defendant is a pilot and the first defendant's husband. The defendants married on 3 March 2007. On 23 June 2008, the first defendant gave birth to her daughter who will be referred to in this judgment as child C. Child C thus was born into a valid marriage between the defendants.

[4] The plaintiff is a male and also makes his living as a pilot. He works in the same airline as the first defendant but different from that of the second defendant. We consider it significant to highlight that all the parties concerned in this suit are non-Muslims.

[5] It is the plaintiff's claim that he had been having an affair with the first defendant even before her marriage to the second defendant, and that this affair continued even after the defendants' marriage.

[6] The plaintiff claims that when child C was born, he had lived periodically with the first defendant and child C as a family, notably when the second defendant was on flight duty. This remains a disputed fact. The second defendant was not in the country at this point. The plaintiff also alleged that all this while, he had been paying the first defendant a monthly sum as 'maintenance' for child C, initially in the amount of RM1,000 per month and that he later increased this to RM3,000 per month. He claimed that his payment of this 'maintenance' only stopped when the first defendant closed her Maybank account circa August 2014. The plaintiff asserted that the first defendant stopped giving him access to child C in December 2013 and ended their relationship in early 2014.

[7] The plaintiff sought recourse by filing this suit, namely this amended originating summons ('encl 5') praying for the following reliefs:

(1) that a DNA test be carried out in order to determine whether the plaintiff is the biological father of the said child;

(2) if the test shows that the plaintiff is the father of the said child then:

(2.1) the plaintiff be declared as the biological father of the said child;

(2.2) the birth certificate of the said child be rectified to name the plaintiff as the biological father;

(2.3) the plaintiff be given joint guardianship;

(2.4) reasonable access rights according to the plaintiff's work schedule; and

(2.5) the defendants or their representatives be prevented from bringing the said child out of the country without the written permission of the plaintiff;

(3) alternatively, if the DNA test is negative, the plaintiff will withdraw prayers 2.1–2.5 above.

[8] The plaintiff filed encl 5 on the grounds, inter alia, that it was necessary for child C to know who her birth father was, in case of any medical emergencies that may arise in the future.

[9] The defendants opposed the action. They argued that if the court allowed the plaintiff's declaration on the point of paternity, ie declaring the plaintiff as the child C's biological father, the said declaration would render child C an illegitimate child — being born out of the wedlock between the defendants.

[10] The defendants accordingly retaliated with an application of their own for the determination of questions of law pursuant to O 14A of the Rules of Court 2012 ('the ROC 2012') and s 15 of the CJA 1964. They prayed for the following reliefs ('encl 16'):

(a) since s 112 of the Evidence Act 1950 ('the EA') states that the said child (name omitted) who was born to the defendants during the subsistence of a legal marriage, is the legal child of the defendants, that the plaintiff's application in encl 5 (the amended OS) must be dismissed with costs;

(b) that the plaintiff's amended OS dated 27 July 2015 be stayed pending the decision of this notice of application and the question in para 1 above;

(c) if prayer 1 above is dismissed, that both the defendants be allowed to file their affidavits in reply within 14 days from the date of this order;

(d) that the names, addresses, details and any other evidence whether oral or documentary to these proceedings which may lead to the identification of the parties and the said child not be published or caused to be published by any party and that the said names and/or identity of the said child be referred to by initials only;

(e) any further or other relief the court deems fair and reasonable; and

(f) costs to be borne by the plaintiff.

[11] Parties subsequently agreed upon paras 2–3 of encl 16 by consent. The plaintiff also made an oral application to withdraw prayers 2.2, 2.3, 2.4 and 2.5 of encl 5, which the High Court allowed. In the result, the plaintiff now only substantively seeks prayers (1) and 2.1 in encl 5 which is, for the court to order

a DNA test to determine child C's paternity and the resulting declaration that the plaintiff is her father.

[12] The High Court judge allowed prayer 1 of encl 16 and dismissed encl 5 on the grounds that the plaintiff's action in the said encl 5 was without merit and had no legal basis ('the impugned order').

[13] The aggrieved plaintiff's appeal came before us. We heard and unanimously allowed the appeal on 5 September 2017. We ordered that the impugned order be set aside, encl 16 was dismissed and that the plaintiff's amended OS be converted into a writ action so that the disputed facts could be fully ventilated vide viva voce evidence. We accordingly remitted the matter to the High Court for trial. We made no order as to costs and also ordered that the deposit be refunded to the plaintiff.

THE DECISION OF THE HIGH COURT

[14] The High Court, after referring to certain local and Indian authorities, made the impugned order substantially on two fronts.

[15] Firstly, that the plaintiff's action is caught by s 112 of the EA. The DNA test sought by the plaintiff concerns both the paternity and legitimacy of child C. The said s 112 presumes the fact of marriage as conclusive proof of legitimacy. Being born into the defendants' marriage is thus conclusive proof that child C is their legitimate child. This presumption, it is said, may only be rebutted on the grounds of 'non-access' between the parties to the marriage. The law therefore does not authorise the use of DNA tests to challenge paternity and to rebut the said presumption in this way.

[16] The second reason concerns public policy. The High Court opined that allowing the DNA test will have adverse effects on the welfare of child C. A declaration that child C is in effect an illegitimate child will bring about negative public perception over her and disrupt the stability of the defendants' family to raise child C in a loving environment.

[17] The High Court judge was of the view that if the DNA test was allowed and child C was discovered to be illegitimate, it would have negative consequences for child C and disrupt her happy family life. Her Ladyship opined that it may be a different situation if the defendants admitted that the plaintiff was the father of child C and the birth certificate did not state the name of the father. However, in this case, the defendants' names are on the birth certificate and they have raised child C. The plaintiff did not dispute that child C was born during the subsistence of the defendants' marriage. Therefore, the High Court judge held that the birth certificate is conclusive proof that the

A defendants were legally married when child C was born. She made her decision to allow encl 16 and to dismiss encl 5 supposedly premised on the best interests of the said child.

SUBMISSIONS OF PARTIES ON APPEAL

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[18] At the outset, we are constrained to state that the parties' submissions were not entirely sufficient to fully assist us. As a result, we had to undertake further research to ensure that the interests of the child were fully considered and protected. That being said, we attempt to sum up their submissions here.

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[19] The plaintiff argued that encl 5 had nothing to do with the legitimacy of child C. Instead, the plaintiff was only concerned with determining her paternity. Counsel referred to article 7 of the United Nations Convention on the Rights of the Child ('the UNCRC') to argue that the best interests of the D child was for the child to know his or her biological parents. Section 112 of the EA has nothing to do with this case and hence, the learned judge erred by holding that child C's legitimacy precedes the child knowing the truth of her paternity. No argument was advanced to support the plaintiff's assertion that E courts can order DNA tests to determine paternity.

[20] The defendants argued that the declaration of paternity sought by the plaintiff has the 'plain, obvious and unavoidable effect of illegitimising the Child'. Section 112 of the EA thus clearly applies and the only rebuttal F evidence permissible under the law is that of 'non-access' between the married couple. They also relied on Indian authorities to argue that the best interest of child C, and the policy behind s 112 of the EA, is in not illegitimising the child. Thus, the learned judge was correct in determining it to be in the best interests of child C to continue to enjoy the stability of her relationship with the G defendants and not to be stigmatised by the negative public perception of illegitimacy.

[21] We were not persuaded by either the arguments advanced by the defendants or the reasoning of the learned judge who adopted the defendants' H arguments in toto. Our reasons for so saying so are set out below.

OUR DECISION

Legitimacy, paternity, and s 112 of the EA

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[22] It was our considered view that the learned judge fell into error when Her Ladyship linked paternity with legitimacy. Section 112 of the EA only concerns the latter ie legitimacy. We find authority for this proposition in the decision by KC Vohrah J (as he then was) in *Chua Kim Suan v Ang Mek Chong*

[1988] 3 MLJ 231 at p 234:

> That brings me to the argument, this time, of defence counsel. He says once it is accepted by the court that the defendant gave birth to Pang Hua then the presumption in s 112 of the Evidence Act 1950 should be invoked that since the birth was during the marriage of the deceased and the defendant it is conclusive that the child is the child of the deceased and that the only way of disproving that is to show that the defendant and the deceased had no access to each other. *With respect, the argument of counsel is misconceived. The issue is not one of the legitimacy of the child, whether the child was born in or out of wedlock but whether the child was the issue of one set of lawfully wedded parents or another set of lawfully wedded parents and therefore the provisions of s 112 of the Evidence Act are not applicable in this case*. (Emphasis added.)

[23] In other words, s 112 of the EA does not bar enquiry into the paternity of a child. Paternity and legitimacy are two distinct, though admittedly, interrelated concepts. As has already been said, s 112 of the Malaysian and Indian Evidence Acts are in pari materia. Indian decisions will thus shed light on this point of law. We draw support for this distinction between 'paternity' and 'legitimacy' from the decision of the High Court of Kerala in (*Babu Remyalayam Veettil v Vidya D/o Santhini Kalathinte Padeetthathil Veettil* OP (FC) No 507 of 2014 (R) decided on 26 November 2014) where K Harilal J held as follows:

> 10. The term 'legitimacy' employed under Section 112 of the Evidence Act refers and determines the legal status of birth, ie whether legitimate or illegitimate. To put it differently, legitimacy of a child is its right to be officially or legally as such. There, the question in controversy may be whether the child is born in a legally valid marriage or not. Thus, the presumption of 'legitimacy' follows subsistence of a valid marriage and the same is conclusive proof of the legitimate birth of the child, unless it is rebutted by the evidence of non-access. Therefore, no evidence can be adduced for the purpose disproving it, unless and until non-access between the spouses is shown ...
>
> 11. Whereas, paternity is the state or fact of being father of a particular child ... *In short, legitimacy and paternity are different and distinct. In our view, in that enquiry to find out the true fatherhood of a child, the legal presumption as to the legitimacy under Section 112 of the Evidence Act would not bar a scientifically accurate and approved test, if the facts and circumstances of the case tend to make such an enquiry imminently needed.* When the fatherhood of a child can be determined accurately without doubt by the DNA test, there is no need to ascribe the fatherhood on an innocent person on presumption ... Since the legitimacy and paternity are distinct and different and working under different spheres in different perspective ... the presumption under Section 112 of the Evidence Act cannot be extended or stretched so as to put as a legal bar in the way of enquiry to find out the true fatherhood of a child. We are of the further opinion that in every enquiry, the method to be adopted depends upon the 'fact in issue' to be determined. (Emphasis added.)

[24] We were of the view that the concepts of 'paternity' and 'legitimacy' should necessarily be separated. The former concerns a question of fact; the latter a question of law. Section 112 of the EA constitutes adjectival law, and it is trite that adjectival law must be interpreted liberally so as not to defeat the rights of parties. This is all the more so when it comes to s 112 of the EA which dates back to 1872. It is an outdated and anachronistic legal provision that ought to be construed and given effect in line with modern day scientific advancements.

[25] We find strong support for our above view in the decision of the Indian Supreme Court in *The State of Punjab v Shamlal Murari & Anor* [1976] 1 SCC 719 at para 8 which held:

> We must always remember that processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice.

[26] On the interpretation of s 112 of the EA, the High Court of Delhi quite recently in its unreported judgment in *Rohit Shekhar v Narayan Datt & Anor* (FAO(OS) No 547/2011 decided on 27 April 2012), at para 21, cited with approval the following passage from *Bennion on 'Statutory Interpretation'* (2nd Ed) which we respectfully adopt:

> It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.
>
> In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, in social conditions, technology, the meaning of words and other matters. ... That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording. An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials.

[27] We address first the argument by the defendants that a declaration of paternity has the effect of illegitimising a child. This appears to be the legal conundrum created by s 112 of the EA. A

[28] Our law, and indeed the law of many civilised nations, recognises that a child may in fact be an illegitimate child, but, by operation of the law, the said child may still be considered legally legitimate. We seek to illustrate this point. B

[29] There is another point. This concerns the policy point behind s 112 of the EA. To paraphrase what was said earlier, the learned judge relied on outdated Indian authorities to hold that the policy behind s 112 of the EA is to prevent the illegitimising of children. That, it was said, is in the best interest of child C. C

[30] The plaintiff relied on article 7 of the UNCRC to argue that the best interests of children require that they have a right to know who their biological parents are. The said article 7 reads as follows: D

> *Article 7*
>
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, *the right to know and be cared for by his or her parents*. (Emphasis added.) E

[31] Since the UNCRC has been cited to us, we also think that article 3 of the same would be relevant to this suit. The relevant portion of article 3 reads: F

> *Article 3*
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.* (Emphasis added.) G

[32] The prevailing rule is that international treaties and conventions are not directly applicable to domestic law until and unless they are incorporated into domestic law (see *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766). The plaintiff has not shown us how the above-cited articles are applicable in Malaysia. H

[33] That being said, where the law is ambiguous, the courts will still be charged with the duty to interpret local statutes in a manner where their 'language will be in conformity and not in conflict with international law'. This includes the development of common law 'by reference to statutory policy' (see *Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors* [2012] 1 MLJ 832 at para 29 citing Mason CJ of the High Court of Australia in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 at p 363: I

A But the fact that the convention has not been incorporated into Australian law does not mean that its ratification holds no significance for Australian law. *Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party* (*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1), B at least in those cases in which the legislation is enacted after, or, in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligation under international law. *It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law* (*Polites v The Commonwealth* (1945) 70 CLR 60). Apart C from influencing the construction of a statute or subordinate legislation, *an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law* ... But the courts should act D in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law. Judicial development of the common law must not be seen as a back door means of importing an unincorporated convention into Australian law. *A cautious approach to the development of the common law by reference to international conventions would be* E *consistent with the approach which the courts have hitherto adopted to the development of the common law by reference to statutory policy and statutory materials* (*Lamb v Cotogno* (1987) 164 CLR 1 *at pp 11–12). Much will depend upon the nature of relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing* F *principles of our domestic law*. (Emphasis added.)

[34] We are mindful that Malaysia made a reservation against article 7(1) of the UNCRC. The said reservation reads:

> The Government of Malaysia accepts the provisions of the Convention on the G Rights of the Child but expresses reservations with respect to articles 1, 2, 7, 13, 14, 15, [...], 28, [paragraph 1 (a)] 37, [...] of the Convention and declares that the *said provisions shall be applicable only if they are in conformity with the Constitution, national laws and national policies of the Government of Malaysia*. (Emphasis added.)

H **[35]** However, this 'supposed' policy reasoning behind s 112 of the EA in not wanting to illegitimise children ought no longer to be the sole judicial philosophy in light of modern day global advancements in science and international human rights law. We find strong support for this view in the judgment of Ravindra Bhat J in *Rohit Shekhar* (at para 34 of this judgment) and I we concur with his views. His Lordship held as follows:

> 22. The entire focus of attention and legislative concern in enacting Section 112 with a near impregnable presumption of legitimacy was premised on the welfare or best interests of a child, and society's assurance that a child born to a woman after the marriage, should not except under limited circumstances be exposed to any

inquiry about who was his true father. This overarching concern also was aimed at protecting a woman from allegations of unchastity, and the resultant harassment that she could be subjected to in legal proceedings. While those concerns are as real today as they were when the provision was enacted, nevertheless *subsequent changes in women's status, the rights enjoyed by them, scientific developments and advancements, and changes in legal provisions which recognize a child's right to know its biological antecedents, cannot be ignored*.

23. The right of the child to know of her (or his) biological antecedents is now recognised internationally as being of critical importance. Major international instruments such as the UN Declaration on Human Rights have recognized the rights of a child irrespective of her (or his) legitimacy and the Convention on the Rights of Child, 1990 has expressly specified a right to knowledge of parenthood.

24. The Convention therefore, specifically requires that as far as possible, the State must enable the child to know of his true paternity ...

25. A child's right to know of her or his biological parentage has had a critical influence also in many developments in Europe that have led to lifting the anonymity of a donor in assisted pregnancies and in case of sperm donors. Such donors remained anonymous in Europe till the 1980s. However, later developments mark a shift from the anonymity based approach, and the Courts, tend to lean in support of the child's right to know her or his biological antecedents. Similar laws have been passed in many countries all over the world (such as Sweden in 1985, following which almost all of Europe with the latest addition of the United Kingdom has followed suit) ... *These developments all over the world indicate that there is a very tenable argument in the child's interests that support its right to know the truth of its origin*. (Emphasis added.)

[36] We do not see why the aforementioned principles are not applicable in Malaysia. As we have already held, s 112 of the EA does not bar enquiries into paternity yet, at the same time, conclusively presumes legitimacy. Enquiries per se into paternity do not in this sense illegitimise a child. Thus, this emphasis on the fear of illegitimising the said child is not the determining factor when deciding to order a DNA test to determine paternity. Instead, the best interest of the child to know its biological parents is the larger concern. In this vein, the learned judge fell into error in Her Ladyship's pre-occupation with the supposed fear of illegitimising child C.

[37] This legal issue should have been accorded full consideration after a full ventilation of the factual matrix to determine the disputed factual issues. This, Her Ladyship failed to do, merely adopting the arguments of the defendants entirely, as we pointed out earlier.

[38] In these circumstances, we were satisfied that the learned judge had erred in summarily determining an important point of law effectively *in vacuo*. We therefore dismissed the defendants' O 14A application in encl 16, and remitted the matter to the High Court by way of a writ action.

The conversion of encl 5 into a writ action

[39] In allowing the plaintiff's appeal, we were of the view that the plaintiff's amended OS in encl 5 had to be converted into a writ action.

[40] It is trite that when there is a substantial dispute as to fact in any proceedings, such proceedings shall be begun by writ. If at all authority is needed, see: O 5 rr 2 and 4 of the ROC 2012. In our reading of the affidavits in this action, it is as plain as pikestaff that the defendants deny many of the allegations made by the plaintiff in respect of his purported relationship with the first defendant and child C. These are crucial matters. The plaintiff's claim ought not to have been dismissed outright in the absence of judicial determination on these crucial issues. Such determination can only be made with full *viva voce* evidence.

[41] In this vein, we ordered that encl 5 be remitted to the High Court and be converted into a writ action. We did so in accordance with O 1A, O 2 r 1, O 28 r 8 and O 92 r 4 of the ROC 2012. In this way, parties may fully ventilate all issues. If at all precedent is needed, we refer to the decision of the Court of Appeal in *Lee Lai Cheng No 2* (at para 62) where this court remitted the O 14A application to the High Court for trial. This stood independently from the point as to whether our courts are empowered to order DNA tests under their inherent jurisdiction.

CONCLUSION

[42] We began this judgment by identifying one issue of primary concern. We summarise our judgment as follows:

(a) the High Court erred in summarily dismissing the plaintiff's claim solely on its limited construction of s 112 of the EA without attempting to consider the factual disputes patently clear on the face of the opposing affidavits. This in itself, rendered the application for disposal under O 14A of the ROC untenable. The learned judge failed to recognise that the said s 112 ought to have been construed in the context of the factual matrix after a determination of the factual disputes. Her Ladyship's failure to do so effectively meant that s 112 of the EA was construed *in vacuo*;

(b) 'Paternity' and 'legitimacy' are separate issues. Paternity is a question of fact whereas legitimacy is a question of law. Section 112 of the EA only concerns legitimacy. It does not bar enquiries into paternity;

(c) in a suit where only paternity and not legitimacy is in issue, the law conclusively presumes that the child whose paternity is in question is the legitimate child of the man to whom the mother was lawfully married at

the time of the said child's birth. The 'access' proviso to s 112 of the EA is only invoked if the child's legitimacy is challenged;

(d) in determining whether a paternity test ought to be ordered, the court must have regard to the best interests of the child. 'Best interests' here refers to the right of the child to know who his or her biological parents are. The court ought not to be concerned solely or wholly with fears of 'illegitimising the child'. When the factual disputes have been determined, the trial court can then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter. As matters stand, the plaintiff has been effectively deprived of the right to be heard fully; and

(e) it remains incumbent on the High Court to decide whether or not to order a DNA test based on its construction of the law an in the context of the factual dispute before it.

[43] Ultimately we determined that no matter the parties' personal convictions, it is in the best interests of child C that is the determinative factor. This remains an issue to be considered fully by the High Court.

Appeal allowed; impugned order set aside; encl 16 dismissed; encl 5 to be converted into writ action; and matter remitted to High Court for trial.

Reported by Nabilah Syahida Abdullah Salleh